

Introduced by Senator Ackerman

February 22, 2005

An act to amend Section 25118 of the Corporations Code, relating to corporations.

LEGISLATIVE COUNSEL'S DIGEST

SB 627, as introduced, Ackerman. Corporations: usury.

Existing law provides an exemption from state usury provisions for loans that meet certain requirements, with specified financial statements as necessary evidence. Existing law provides that this exemption does not apply to specified evidences of indebtedness and transactions.

This bill would also provide that this exemption from state usury provisions does not apply to an indebtedness secured, in whole or in part, by real property and to an indebtedness with a maturity date that exceeds one year.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 25118 of the Corporations Code is
2 amended to read:
3 25118. (a) An evidence of indebtedness issued by an entity or
4 guaranteed by an entity that is an affiliate (as defined in Section
5 150) of the borrower that, on the day the evidence of
6 indebtedness issued or guaranty is first issued or entered into, has
7 total assets of at least two million dollars (\$2,000,000) according
8 to its then most recent financial statements, and the purchasers or
9 holders thereof, shall be exempt from the usury provisions of the

1 California Constitution. The financial statements referred to in
2 the preceding sentence shall meet both of the following
3 requirements:

4 (1) Be as of a date not more than 90 days prior to the date the
5 evidence of indebtedness or guaranty is first issued or entered
6 into.

7 (2) Be prepared in accordance with either of the following:

8 (A) In accordance with generally accepted accounting
9 principles and, if the entity has consolidated subsidiaries, on a
10 consolidated basis.

11 (B) In accordance with the rules and requirements of the
12 Securities and Exchange Commission, whether or not required by
13 law to be prepared in accordance with those rules and
14 requirements.

15 (b) Any one or more evidences of indebtedness, and the
16 purchasers or holders thereof, shall be exempt from the usury
17 provisions of the California Constitution if either of the following
18 applies:

19 (1) The evidences of indebtedness aggregate at the time of
20 issuance at least three hundred thousand dollars (\$300,000) in
21 original face amount, or, if the evidences of indebtedness are
22 purchased with original issue discount, they are purchased for an
23 aggregate purchase price at the time of issuance of at least three
24 hundred thousand dollars (\$300,000).

25 (2) The evidences of indebtedness are issued pursuant to a
26 bona fide written commitment for the lending to the issuer of at
27 least three hundred thousand dollars (\$300,000), or the provision
28 of a line of credit to the issuer in a principal amount of at least
29 three hundred thousand dollars (\$300,000). The exemption
30 provided by this paragraph shall not be affected by a subsequent
31 event of default or other event not in the lender's control that has
32 relieved or may relieve the lender from its commitment.

33 (c) Any evidence of indebtedness described in subdivision (a)
34 or (b), and the purchasers or holders thereof, shall be entitled to
35 the benefits of the usury exemption contained in this section
36 regardless of whether, at any time after the evidence of
37 indebtedness or guaranty upon which the exemption is based is
38 first issued or entered into, the evidence of indebtedness or
39 guaranty is determined by a court of competent jurisdiction not to
40 be a "security."

1 (d) This section creates and authorizes a class of transactions
2 and persons pursuant to Section 1 of Article XV of the California
3 Constitution.

4 (e) This section does not apply to:

5 (1) Any evidence of indebtedness issued or guaranteed (if the
6 guaranty is part of the consideration for the indebtedness) by an
7 individual, a revocable trust having one or more individuals as
8 trustors, or a partnership in which, at the time of issuance, one or
9 more individuals are general partners.

10 (2) Any transaction subject to the limitation on permissible
11 rates of interest set forth in paragraph (1) of the first sentence of
12 Section 1 of Article XV of the California Constitution.

13 (3) *Any indebtedness secured, in whole or in part, by real*
14 *property.*

15 (4) *Any indebtedness with a maturity date that exceeds one*
16 *year.*

17 (f) The exemptions created by this section shall only be
18 available in a transaction that meets either of the following
19 criteria:

20 (1) The lender and either the issuer of the indebtedness or the
21 guarantor, as the case may be, or any of their respective officers,
22 directors, or controlling persons, or, if any party is a limited
23 liability company, the managers as appointed or elected by the
24 members, have a preexisting personal or business relationship.

25 (2) The lender and the issuer, or the lender and the guarantor,
26 by reason of their own business and financial experience or that
27 of their professional advisers, could reasonably be assumed to
28 have the capacity to protect their own interests in connection
29 with the transaction.

30 (g) For purposes of this section, “preexisting personal or
31 business relationship” and “capacity to protect their own interests
32 in connection with the transaction” as used in subdivision (f)
33 shall have the same meaning as, and be determined according to
34 the same standards as, specified in paragraph (2) of subdivision
35 (f) of Section 25102 and its implementing regulations provided
36 that, solely with respect to this section, a lender or purchaser who
37 is represented by counsel may designate that person as its
38 professional adviser whether or not that person is compensated
39 by the issuer or guarantor, as long as that person has a bona fide
40 attorney-client relationship with the lender or purchaser.

- 1 (h) This section shall not exempt any person from the
- 2 application of the California Finance Lenders Law (Division 9
- 3 (commencing with Section 22000) of the Financial Code).

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